IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. ——

SHERMAN L. RUMBERGER, *Petitioner,*

v.

JOHN H. WELSH, PARISE TRUCKING COMPANY, INC., and LOUIS C. PARISE, *Respondents.*

BRIEF IN SUPPORT OF PETITION.

Report of Opinions Below.

This case in the District Court was not reported. The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 131 F. 2d 384.

Grounds for Jurisdiction.

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A. § 347, and Rule 38 of the Rules of this Court.

Statement of the Case.

The principal facts are set forth in the petition, *supra,* pp. 1-3, and further detailed facts will be referred to in the course of the argument which follows.

Errors to be Urged.

1. The Court below erred in holding as a matter of *law*, contrary to the law of New York as judicially determined, that Welsh, a special employer, was not responsible for the negligent acts of his employee, Parise.

2. The Court below erred in directing dismissal of the complaint as to Welsh instead of remanding the case to the District Court for a new trial.

Summary of Argument.

1. The Circuit Court of Appeals Erred in Holding as a Matter of Law That Welsh Was Not Responsible for the Negligent Acts of His Employee, Parise.

2. Assuming That the District Court Committed Error in Its Instructions to the Jury or Otherwise in the Course of the Trial, the Circuit Court of Appeals Erred in Dismissing the Complaint as to Welsh, Instead of Directing a New Trial, No Motion for Judgment Notwithstanding the Verdict Having Been Made.

ARGUMENT.

1. The Circuit Court of Appeals Erred in Holding as a Matter of Law That Welsh Was Not Responsible for the Negligent Acts of His Employee, Parise.

Opinion Below.

That part of the opinion below referring to the liability of Welsh, here under consideration, consists of one paragraph reading as follows:

> "There remains for consideration the appeal of Welsh who contends that he cannot be held responsible for the negligence of Parise. This is a matter to be determined by the local law. The question of the responsibility of one who hires an instrumentality and its operator for the operator's torts has been much litigated in the courts of New York and uniform appli-

cation of the recognized principle to different sets of facts seems not always to have been made. See *Charles* v. *Barrett*, 233 N. Y. 127, 129; *cf. Schmedes* v. *Deffaa*, 214 N. Y. 675, reversing 153 App. Div. 819. The subject has been ably reviewed in a recent opinion written by the present Chief Judge of the Court of Appeals. *Irwin* v. *Klein*, 271 N. Y. 477. That decision fits the case at bar like a glove. The position of Welsh with respect to Parise is the same as that of Paramount Publix to the automobile driver in *Irwin* v. *Klein*. Welsh surrendered to the railroad the same control of the truck driver as the Trucking Company had surrendered to him. It is true that Welsh's contract with the railroad provided that 'the chauffeur shall be the employee of J. H. Welsh.' But this provision cannot be effective to give him such status as between Welsh and the plaintiff. In viewing Welsh's legal relations with the plaintiff whether Parise was Welsh's employee *must depend upon the facts proven. Clearly Welsh could control the chauffeur only to the extent of giving instructions where to report with the truck for work; he could give no orders as to how Parise was to operate the winch and boom or secure the boom for travel.* As to those matters his relations with his general employer were not changed; no control in these respects was ever surrendered by the Trucking Company to Welsh. As to Welsh the judgment must be reversed and the complaint dismissed. As to the other appellants the judgment is affirmed." (Emphasis supplied) (R. 477-478).

It thus appears that the Circuit Court of Appeals held as a matter of law that at the time of the accident Parise, the driver, was not Welsh's employee and that Welsh could not be held for Parise's negligence in failing to properly secure the boom on the truck for travel, although the jury, *upon the facts proven* to its satisfaction, reached a contrary conclusion.

Parise was Welsh's Employee and Subject to His Orders and Control.

From a factual standpoint, the fundamental error in the opinion below is found in the statement that:

> "Clearly Welsh could control the chauffeur only to the extent of giving instructions where to report with the truck for work; he could give no orders as to how Parise was to operate the winch and boom or secure the boom for travel." (R. 478)

There is not one word of testimony in the record to justify either of these statements, and in fact, the record is to the contrary. The Court below not only overruled the jury on the facts proven, but assumed facts not proven, to support its ruling.

The contract between Welsh and The Long Island Railroad Company, by whom petitioner was employed, provided that Welsh would furnish "motor trucks and chauffeurs for use in connection with the Grade Crossing Elimination program," including a "5 ton [truck] (with winch and pole derrick)", such as the one involved in the accident, and Welsh therein agreed that "the chauffeur shall be the employee of J. H. Welsh." (R. 18, 19, 436-7) In other words, Welsh furnished the "service", i. e. the machines as well as the operators.

On the morning of the accident, September 6, 1940, Parise reported to Welsh for his instructions and orders for the day and was told to report to the Ozone Park Freight Yard of the Railroad Company. He stated that "on about 10 different occasions prior to September 6, 1940, I (he) had been instructed to report to the J. H. Welsh Trucking Company and they would then give me (him) my (his) orders for the day." (R. 445) He was furnished by Welsh with printed slips bearing Welsh's name for recording the time spent on the job and these were signed at the end of the day by a Railroad Company foreman. (R. 203, 444)

The trial Court instructed the jury that they were "at liberty to find a verdict against Welsh on the theory that *Parise was doing Welsh's work,*" (R. 418) and further that in the matter of securing the boom for travel Parise was "then engaged in carrying out the defendant Welsh's contract with the railroad company, * * * " (R. 423).

The Court also charged the jury that "Welsh could have called him (Parise) on the telephone at 2 o'clock that afternoon and said, 'I am going to take you off that job' and if he had done that Louis Parise would have had to obey those instructions and report either to Welsh's office or to another job." (R. 417)

The Court also charged that "the defendant Welsh, hired the motor truck, boom and chauffeur Louis Parise from the defendant, Parise Trucking Co., Inc., as additional facilities to aid him in his trucking business and in the carrying out of his contract with the Railroad Company." (R. 422)

Charge to Jury Without Exception Became Law of the Case.

No objection or exception was noted by counsel for Welsh to these parts of the charge given by the District Judge and they were not and could not be assigned as errors in the Circuit Court of Appeals (Rule 51, Federal Rules of Civil Procedure). They became the law of the case under the settled practice of the State of New York.

In *Buckin* v. *L. I. R. R. Co.,* 286 N. Y. 146 (1941), 36 N. E. (2d) 88, the Court said:

> " * * * No objection was made by the plaintiff owner to this charge, nor did he make any requests to charge. Thus, although erroneous, this charge became the law of this case * * * "

In *Brown* v. *Ratner,* 33 N. Y. S. 2d 199 (1942) the Court, referring to the Buckin case, said:

> " * * * The charge to the jury in that part thereof of which the appellant now complains was given by the learned trial justice without exception and became the law of the case. * * * "

Control of Employee is Test.

Under the well recognized law of New York, the relationship of master and servant and the liability of the former for the negligent acts of the latter is to be determined by the *power* of the master to control the acts of the servant and not by the actual control exercised.

This is clearly set forth in *Matter of Morton,* 284 N. Y. 167, 172 (1940), decided subsequent to the case of *Irwin* v. *Klein,* referred to by the Court below and hereinafter discussed. In the *Morton* case, the Court quoted with approval from Salmond on Torts, as follows:

> "What, then, is the test of this distinction between a servant and an independent contractor? The test is the existence of a *right of control* over the agent in respect of the manner in which his work is to be done. A servant is an agent who works under the supervision and direction of his employer; an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's order." (Emphasis supplied)

Welsh had the *power* to control the actions of Parise while he was "engaged in carrying out the defendant Welsh's contract" with the Railroad Company. It was Welsh's duty to see that his business, whether carried on by his own employee or through a "borrowed" employee, was conducted in such manner as not to injure others.

As this Court said in *The Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 221:

> "* * * the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. * * *"

That Parise was a "borrowed" employee and not a regular employee of Welsh does not diminish Welsh's responsibility for Parise's negligence. As the Court said in *Baldwin* v. *Abraham*, 57 App. Div. N. Y. 67, 80, 67 N. Y. S. 1079 affirmed 171 N. Y. 677:

> "To say that under such circumstances the defendants would be responsible for the negligence on the public streets of their regular servants, but not for that of those thus temporarily hired, is so repugnant to reason and justice that it would be little short of amazing if it had yet found place in the adjudications of the State."

The finding of the Court below that Welsh was not liable because "he could give no orders as to how Parise was to operate the winch and boom or secure the boom for travel" is totally without support in fact or in law.

In no reported case found, either in the State of New York or elsewhere, has any Court gone so far as to hold that recovery by a third person against an employer is barred by failure of affirmative proof that the employer had not cautioned the employee against negligent actions. If such was the law, then responsibility in the ordinary street accident case would be avoided if plaintiff was unable to show that the defendant employer failed to caution his employee driver against excessive speed and other traffic violations.

In the trial Court, the issue of the control of Welsh over the actions of Parise was properly left to the jury under appropriate instructions and that issue found against Welsh. In fact, at the first trial, which resulted in a jury disagreement, although it does not appear of record, the same issue was likewise presented to the jury by a different District Judge.

Relationship of Master and Servant Question of Fact for Jury.

The law is well settled in New York that the issue of whether or not the relationship of master and servant exists is a question of fact to be determined by the jury and not a matter of law to be decided by the Court.

This rule has been affirmed by the New York Court of Appeals in two recent cases, citing with approval earlier decisions of that Court, including *Irwin* v. *Klein, supra,* relied upon by the Court below.

In *Johnson* v. *R. T. K. Petroleum Company,* 289 N. Y. 101, 44 N. E. 2d, 6 (1942) the Court said:

> "On this record it was error to hold as a matter of law that the co-defendant driver and owner of the truck was an independent contractor rather than a servant of the corporate defendant. The nature of the relationship existing was a question of fact which the trier of the facts resolved in favor of the plaintiff. (See *Braxton* v. *Mendelson,* 233 N. Y. 122; *Matter of Glielmi* v. *Netherland Dairy Co.,* 254 N. Y. 60; *Irving* v. *Klein,* 271 N. Y. 477; *Fritz* v. *Krasne,* 273 N. Y. 649.) The evidence sustains that finding."

and again in *Shinbaum* v. *Murphy,* 287 N. Y. 529, 531 (1942), the Court said:

> "We think the courts below erred in declaring as an inference of law that the co-defendant Murphy was the servant of the defendant-appellant Cross & Brown Company rather than an independent contractor. Whether the one relation or the other existed between them was a question for the jury. (See *Fritz* v. *Krasne,* 273 N. Y. 649; *Irwin* v. *Klein,* 271 N. Y. 477; *Matter of Glielmi* v. *Netherland Dairy Co.,* 254 N. Y. 60)."

New York City Grade Crossing Elimination Act.

The contract between Welsh and the Railroad Company (R. 436-7) was not an ordinary contract between individuals, but was one in which the public was vitally concerned and required by statute to be submitted to and approved by the New York Transit Commission. (R. 19)

The New York City Grade Crossing Elimination Act (L. 1928 Ch. 677 § 2 sub 8) provides in part as follows:

> "Each such railroad corporation, or the one designated by the commission if two or more are affected by the order, shall let the necessary contracts therefor under the direction of and subject to such rules and regulations as may be prescribed by the commission. The commission may direct that the work be done by contract, or by direct employment of labor and purchase of material, or partly by contract and partly by direct employment of labor and purchase of material, limiting, however, in each case, the amount to be expended without contract. All proposals of contractors shall be submitted to the commission for its approval, and if the commission shall determine that the bids are excessive, it shall have the power to require the submission of new proposals. Upon the awarding of any contract by a railroad corporation, certified copies thereof shall be filed with the comptroller, the transit commission and the city. No contract for the elimination of a crossing shall be let by a railroad corporation, nor shall a railroad corporation begin construction work pursuant to an order of the transit commission, until the commission so directs."

It is obvious that it was the intent of the Legislature to see that in all contracts relating to grade crossing eliminations the public was fully protected, including protection from and on account of personal injuries. The contract between Welsh and the Railroad Company, as submitted to and approved by the Transit Commission, which provided that "the chauffeur shall be the employe of J. H. Welsh," contained the following paragraph:

> "Evidence shall be furnished that insurance is carried as follows:
>
> (a) Workmen's Compensation Insurance.
>
> (b) Public Liability Insurance in the limits of $50,000/100,000 and Property Damage Insurance in the amount of $5,000 to protect J. H. Welsh and The Long Island Railroad Company." (R. 19, 438)

This portion of the contract was excluded from the evidence over the objection of petitioner's counsel (R. 17-18). Although this ruling of the trial court was clearly erroneous (*Rashall* v. *Morra*, 250 App. Div. 474, 294 N. Y. S. 630, it was not reviewed by the Circuit Court of Appeals inasmuch as the verdict and judgment were in favor of petitioner, and the rejected paragraph, therefore, was not before the appellate Court. Petitioner also offered to prove in the trial Court that Welsh secured the insurance required by his contract and that such insurance covered injuries to persons (such as petitioner) while riding upon the hired trucks, but this offer likewise was refused by the trial Court (R. 207-8) and was not considered by the Circuit Court of Appeals.

By the decision of the Circuit Court of Appeals, one of the prime purposes of the legislative enactment, the protection of the public, has been nullified and Welsh has been permitted to disregard and escape the responsibilities of his contract, formally executed and approved by the Transit Commission, by subletting a part of the work to be performed thereunder to another, of no proven financial responsibility or public liability insurance coverage.

Irwin v. Klein.

Irwin v. *Klein*, 271 N. Y. 477, decided in 1936, was relied upon exclusively by the Court below in reversing the judgment as to Welsh. Concerning the *Irwin* case, the Court below said:

> "That decision fits the case at bar like a glove. The position of Welsh with respect to Parise is the same as that of Paramount Publix to the automobile driver in *Irwin* v. *Klein*. Welsh surrendered to the railroad the same control of the truck driver as the Trucking Company has surrendered to him."

The facts in the *Irwin* case are these. RKO contracted to rent from Paramount the necessary personnel, equipment and materials for the shooting of certain scenes on the streets of New York City, including an automobile to

be driven at a high rate of speed in apparent disregard of traffic signals with a police escort. Paramount hired an automobile and chauffeur from Klein, which in turn were supplied to RKO under its contract, to be used in such a scene. Through the negligence of the chauffeur, the policeman escorting the car was injured. Judgment was given below against RKO, Paramount and Klein and on appeal, the judgment as to RKO and Klein was affirmed, but reversed as to Paramount. (The judgment against Klein was affirmed on his liability under the New York Vehicle and Traffic Law, which imposes upon an owner of an automobile liability for all damages caused by negligent operation of the car, when used with his consent, and was not based upon Klein's responsibility as general employer, which was the basis apparently used by the Court below in the case at bar for sustaining the judgment against Parise Trucking Company.)

In the *Irwin case,* the New York Court of Appeals stated the general principles of the law of agency applicable to an employee of this type as follows:

> "This same principle of the law of Agency must be applied when the contract for work is not made with the workman but with a general employer of the workman. If the general employer's contract is to furnish an employee who will do the specified work under the supreme direction and control of the person for whom the work is to be done, the workman becomes for the time being the servant of the person to whom he is furnished. The general employer's 'business' in the matter does not include the doing of the work. He has no control of the manner in which it is performed, and the workman though hired by him does not act as his agent *but as the agent of his employer for the time being to whose orders he must submit.*" (Emphasis supplied)

Applying these principles to the case at bar, there would seem to be but little question that Parise became the employee of Welsh, whose work he was to undertake and "to whose orders he must submit."

Further, in the *Irwin* case, the Court, after pointing out the dangerous use to which the Klein automobile was to be put under the minute instructions and directions by RKO, as follows:

> "Here the circumstances are different. At the time of the accident the automobile was being put to a use, extraordinary and inherently dangerous in its nature. It could not be operated in such use without continuous and unquestioned control by the user. RKO used the automobile, and through its employee did exercise such control * * *."

held that Paramount, having become the temporary employer of Klein's chauffeur, passed on and surrendered to RKO the same right of control over the chauffeur which it had received from Klein, saying:

> "It surrendered to RKO the same control over the driver which Klein had surrendered to it. Both the *express terms of the contract* and the *manner in which it was carried out* show conclusively that so far as concerns the taking of the picture, Paramount's 'business' extended only to furnishing the personnel and equipment, and RKO business began at that point. In that business RKO had sole control and direction and is liable as principal for negligence of its servants. Paramount Publix has no such responsibility." (Emphasis supplied)

It would seem at once obvious from this last quotation that the *Irwin* case does not fit the instant case "like a glove"; that "the position of Welsh with respect to Parise is" not "the same as that of Paramount Publix to the automobile driver in *Irwin* v. *Klein,*" and that Welsh did not surrender to the Railroad Company "the same control of the truck driver as the Trucking Company had surrendered to him," as stated by the Court below.

There is not one word of testimony in the record to even indicate that the Railroad Company received from Welsh or in any manner acquired the control of Parise as to

the operation of the boom, the negligent handling of which was the proximate cause of petitioner's injuries. On the contrary, the undisputed fact is that Parise had sole charge and control over the operation and handling of the boom, stating "I was never permitted to let anyone help or assist in the operation of the winch or boom and I was familiar with its operation". (R. 285, 445) Also, the District Court charged the jury, without objection, that "the chauffeur was in the exclusive charge and control of the boom" and "it was his duty to make the boom secure and safe for travel and to prevent it from falling". (R. 423)

This Court in *Standard Oil* v. *Anderson,* 212 U. S. 215, 226, quoting with approval from the opinion in *District* v. *Towle,* 181 Mass. 416, said:

> "'But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant more than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books.'"

having said that

> "The giving of the signals [to a winchman] under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters."

Likewise, in the case at bar, whatever help was given by the Railroad employees in the loading of the cable reels onto the truck did not relate to the physical operation of the boom or the securing of it for travel and no control over these duties of Parise was passed on to the Railroad Company by Welsh.

Using the language of the *Irwin* case, "*the express terms of the contract* and the *manner in which it was carried out* show conclusively that" Parise remained the employee of

Welsh subject to his direction and control and that this direction and control insofar as it related to the negligent act resulting in petitioner's injuries was not passed on to the Railroad Company or to anyone else.

Welsh hired the truck and chauffeur "as additional facilities to aid him in his trucking business and in the carrying out of his contract with the Railroad Company", as the Court charged the jury, without objection. By the "express terms of the contract", which was submitted to and approved by the New York Transit Commission, Welsh agreed that he would furnish the Railroad Company with trucks and chauffeurs for use in the Grade Crossing Elimination program; that he would furnish evidence of acquiring public liability insurance "to protect J. H. Welsh and The Long Island Railroad Company", and specifically that the "chauffeur shall be the employee of J. H. Welsh". Welsh contracted to furnish a particular service of which the chauffeur was a part, and agreed to protect that service by liability insurance.

Law of New York.

The law of the State of New York on the question of master and servant, as applied to facts such as those involved in the case at bar, is clearly set down in *Schmedes* v. *Deffaa,* 214 N. Y. 675 (reversing 153 App. Div. 819, 138 N. Y. S. 931, and adopting dissent of court below). In that case, Herlich, an undertaker, ordered from Deffaa, keeper of a livery stable, a carriage and driver for a funeral procession. Deffaa supplied a carriage and driver which he secured from Naughton, another livery stable keeper, and plaintiff was injured by the negligence of the driver supplied by Naughton. The New York Court of Appeals in holding Deffaa responsible for the driver's negligence (Deffaa standing in the same relative position in that case as does Welsh in the instant case), said:

> "As between the undertaker and the defendant (Deffaa), the latter was an independent contractor,

and the driver, though subject to the former's instructions as to where he should go, was doing the latter's work, and was for the time being under his control, precisely as though in his general employment. As between the general employer and the defendant (Deffaa), the driver was merely loaned by the former to the latter.

"* * * The driver was certainly not doing the work of his general employer, because the latter had not engaged to do that work. He was not doing the work of the undertaker, because the latter had employed the defendant (Deffaa) as an independent contractor to do it. The work, then, was that of the defendant (Deffaa), done by the agencies supplied by him, and subject to his control, except in so far as the undertaker might direct the course of the journey."

This case has been cited as the law of New York on the subject in many subsequent New York cases, including the following cases decided after the *Irwin* case:

LaDuke v. *International Paper Co.*, 17 N. Y. S. 2d 608, 258 App. Div. 375 (1940);
Enstrom v. *City of New York*, 17 N. Y. S. 2d 964, 258 App. Div. 672 (1940);
Osborg v. *Hoffman*, 300 N. Y. S. 690, 252 App. Div. 587 (1937);

and we respectfully submit that it is the law of this case which the Circuit Court of Appeals failed to recognize.

Applying the language of the opinion in the *Schmedes* case to the present case, Parise "was certainly not doing the work of his general employer (Parise Trucking Company) because the latter had not engaged to do that work" and he was not doing the work of the Railroad Company "because the latter had employed the defendant (Welsh) as an independent contractor to do it."

It is therefore respectfully submitted, that under the law of New York, misconstrued and misapplied by the Circuit Court of Appeals, the District Court correctly submitted to the jury the question of the power of Welsh to control the actions of Parise and there was abundant evidence to

support the jury's finding that Welsh did have such power of control, making him answerable in damages for Parise's negligence.

2. Assuming That the District Court Committed Error in Its Instructions to the Jury or Otherwise in the Course of the Trial, the Circuit Court of Appeals Erred in Dismissing the Complaint as to Welsh, Instead of Directing a New Trial, No Motion for Judgment Notwithstanding the Verdict Having Been Made.

In order that the evidence may be reexamined after verdict looking to a judgment notwithstanding the verdict, without a new trial, not only must some appropriate means be taken to reserve the point before submission of the case to the jury, but the point by some appropriate means must be submitted to the trial judge after verdict and by the trial judge be given or refused consideration. The benefit of this procedure, stressed by the authorities, is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Rule 50 of the Federal Rules of Civil Procedure provides as follows:

"RULE 50. MOTION FOR A DIRECTED VERDICT.

"(a) When Made: Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. *A motion for a directed verdict shall state the specific grounds therefor.*

"(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of

> the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party *who has moved for a directed verdict* may move to have the verdict and any judgment entered thereon set aside and to *have judgment entered in accordance with his motion for a directed verdict;* * * *". (Emphasis supplied)

Under Rule 50, a motion for directed verdict, properly made, including the specification of grounds therefor, automatically reserves the point but does not automatically invoke the action of the trial judge upon the reserved point. This only can be done by the party against whom the verdict is rendered, by the making of a motion for judgment notwithstanding the verdict, if he still conceives himself to be entitled thereto. Since no motion for a directed verdict was properly made on behalf of Welsh and no motion made in his behalf for judgment notwithstanding the verdict, the only errors which could properly be considered by the Circuit Court of Appeals were those allegedly occurring during the course of the trial and upon which a retrial only could be ordered.

At the close of the testimony, counsel for Welsh, having moved "to dismiss the complaint against the defendant Welsh", which was denied by the Court without argument, perfunctorily moved for a directed verdict simply by saying "may I just add to the motion (apparently referring to the motion for directed verdict just made by counsel for Parise and Parise Trucking Company) a motion for the direction of a verdict in favor of the defendant Welsh." This motion, likewise, was denied without argument. (R. 402-3)

Immediately following the rendition of the verdict against all defendants in the sum of $15,000, counsel for Welsh, again in perfunctory manner, moved to set aside the verdict, in the following language:

> "Now, on behalf of the defendant Welsh I move to set aside the verdict as against the weight of evidence under the appropriate section of the Federal Court

Code, and on the ground that it is contrary to the evidence, contrary to the weight of evidence and contrary to the law." (R. 434)

This motion was denied without argument. (R. 435)

Thus counsel for Welsh again failed to specify the grounds upon which he claimed to be entitled to a directed verdict and more importantly, completely neglected to move that judgment be entered in favor of Welsh notwithstanding the verdict.

Consequently, there was no error on the part of the District Court by way of refusal to vacate the verdict and enter judgment for Welsh, because the District Court does not appear to have refused to do so, no request therefor having been made. By no procedure was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that it enter.

Federal Rule 50 now provides for uniform Federal practice, the procedure approved in *Baltimore & C. Line* v. *Redman,* 295 U. S. 654, and discussed at length in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Ins. Co.,* 228 U. S. 364, 400, the latter being prophetic of the adoption of the new Rule. The former Chief Justice in his opinion, made it plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved question of law, a motion for judgment *non obstante veredicto*; a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance remains the same, and that substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the verdict and the granting of a new trial, *unless* means are taken to bring the matter into the record for disposition by the trial Judge *after* the trial.

As further pointed out, this is accomplished by the taking of two steps: *first,* reservation of the point when the

case is submitted to the jury, and *second,* submission of the point to the trial Judge for decision after rendition of the verdict. The means by which these two steps have been accomplished, some of them statutory, have been varied, but without compliance with the substance of the two steps, the party aggrieved by the action of the trial Court, has been held entitled at the most to a new trial. Both of these steps are lacking in the present record.

First, the casual motion for a directed verdict, without the statement of specific grounds therefor, was not in compliance with Rule 50(a) and therefore, may be considered as never having been made.

The Circuit Courts of Appeals have uniformly held that in the absence of a motion for a directed verdict the appellate tribunal may not pass upon the question of the sufficiency of evidence to sustain the verdict.

Baten v. *Kirby Lumber Corp.,* 103 Fed. 2d, 272, 274.
Woolworth Co. v. *Seckinger,* 125 Fed. 2d, 97.
Emanuel v. *Kansas City Co.,* 127 Fed. 2d, 175.

Likewise, the Circuit Courts of Appeals have found that specific grounds in support of the motion, as required by Rule 50(a), must be stated in order to preserve the question of the sufficiency of the evidence to sustain the verdict for the consideration of the appellate court.

Atlantic Greyhound v. *McDonald,* 125 Fed. 2d 849, 850.
Virginia-Carolina Tie and Wood Co. v. *Dunbar,* 106 Fed. 2d 383, 385.

Second, no motion for judgment notwithstanding the verdict was made following the rendition of the verdict, so that there was no submission to or consideration by the District Court of the question whether judgment should be entered in favor of the defendant Welsh despite the verdict against him.

Rule 50(b) providing that:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason

> is not granted, the court is *deemed* to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * * ",

results in an automatic and implied reservation of the point upon the denial of a motion for a directed verdict. The same Rule, however, which so expressly supplies the reservation, does not supply the motion for judgment unless it is properly and seasonably made.

Rule 50 is the instrumentality adopted to accomplish the reform in Federal practice which had been adopted by most of the States. If no motion for judgment is made, then the purpose of the procedure, as explained in *Baltimore & C. Line* v. *Redman,* 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There would be no unhurried second opportunity for the trial Court to rule on the legal point in question. It must have been the unhurried consideration of the trial Court to which this Court so referred, as the appellate Court's opportunity for consideration of the legal question was as unhurried before the Rule was adopted as after.

This Court, in construing and applying under the Conformity Act a State Statute similar to present Federal Rule 50, has held that a motion for judgment *non obstante veredicto* is indispensable to give the Appellate Court authority to direct entry of judgment contrary to the verdict. In *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389, 392, 394-395, the point and ruling are clearly and definitely stated as follows:

> "The Court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments *non obstante veredicto.* The court denied the motions and entered judgments for defendants."
>
> * * * "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point

requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment *non obstante veredicto;* whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. *In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."* (Emphasis supplied)

In the *Slocum* case, *supra,* this Court held that the rules of common law and the requirement of the Seventh Amendment of the Federal Constitution made it obligatory that the Court of Appeals in denying a motion for directed verdict in favor of defendant remand the case for a new trial rather than order entry of judgment for the defendant. This general rule was modified somewhat in the *Redman* case, *supra,* where this Court found that where there had been a specific reservation of the ruling on the motion until after the verdict, a contrary judgment could be ordered by the appellate court. In the *Aetna* case, *supra,* this Court found that the *Slocum* case rule, as modified by the *Redman* case, was not applicable because there had been no reservation of the point.

These cases are reviewed in *Brunet* v. *Kresge Co.,* 115 Fed. 2d 713, and the effect of the Court's ruling in that case is that unless the provisions of Rule 50 are complied with strictly, which includes a motion for directed verdict with specific grounds stated, automatically reserved, and a subsequent motion for judgment notwithstanding the verdict,

the rule in the *Slocum* case, unaffected by the modification of the *Redman case*, (where specific reservation was made) would apply, requiring the Circuit Court of Appeals to order a new trial.

Certiorari Has Been Granted to Review the Application of Federal Rule 50, but Examination of the Merits Made Decision thereon Unnecessary.

The application of Federal Rule 50 under circumstances such as here involved has been before this Court on several occasions but not decided for the reason that in each case the decision has been reached on other grounds.

In *Conway* v. *O'Brien*, 312 U. S. 492, 493, certiorari was granted to the Circuit Court of Appeals for the *Second* Circuit and Mr. Justice Reed, delivering the opinion of the Court, said:

> "*We granted certiorari to examine whether there had been sufficient compliance with Rule 50(b) to authorize dismissal of the complaint*, but our view of the merits makes it unnecessary to discuss this question." (Emphasis supplied)

Also, in *Halliday* v. *United States*, 315 U. S. 94, 96, certiorari was granted to the Circuit Court of Appeals for the Fourth Circuit. Mr. Justice Byrnes, speaking for the Court, said:

> "*We granted certiorari*, as we had in *Berry* v. *United States* and *Conway* v. *O'Brien, because of the importance of the question concerning Rule 50(b)*. However, as in those cases, we do not reach that problem, since we are of the opinion that the evidence was sufficient to support the verdict." (Emphasis supplied)

In *Berry* v. *United States*, 312 U. S. 450, 452, certiorari was granted to the Circuit Court of Appeals for the *Second*

Circuit and Mr. Justice Black, who delivered the opinion of the Court, after referring to the second question raised by petitioner, calling for a construction of Federal Rule 50 in the absence of a motion for judgment notwithstanding the verdict, said:

> "But while this *important point, upon which the Circuit Courts of Appeals are not in complete agreement,* is one of the two questions upon which the petition for certiorari rested, there is no occasion for us to reach it here. For we find that there was sufficient evidence to sustain the jury's verdict, and we hold that the District Court properly denied the government's motion for a directed verdict in its favor." (Emphasis supplied)

Conclusion.

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed, in misconstruing and misapplying the law of New York and deciding as a matter of law an issue which properly had been submitted to and decided otherwise by the jury, and in directing dismissal of the complaint as to respondent Welsh instead of directing a new trial, as required by the Federal Rules of Civil Procedure, resulted in petitioner being deprived of his Constitutional right to a jury trial, and call for review and determination by this Honorable Court.

Respectfully submitted,

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